Supreme Court, U.S.
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NO. (1)

In The Supreme Court of the United States

SAMI GABER,

Petitioner,

v.

KRISTIN HENDERSON, Special Agent, Office of the Inspector General; MICHAEL SPOLIDORO, Special Agent, Office of the Inspector General; MICHAEL KEARNEY, Station Manager, United States Postal Service, and JOHN E. POTTER, United States Postmaster General,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dean E. Wanderer
Counsel of Record
DEAN E. WANDERER & ASSOCIATES
3975 University Drive, Suite 340
Fairfax, Virginia 22030
(703) 246-9515

Counsel for Petitioner

Dated: June 17, 2009

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006 (202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTION PRESENTED

1. Is a surveillance under the facts of this case a search or seizure within the meaning of the Fourth Amendment to the Constitution of the United States?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AUTHORITY INVOLVED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

REASONS WHY THE WRIT SHOULD ISSUE 9

CONCLUSION 12

APPENDIX

A. Unpublished Opinion of The United States Court of Appeals for The Fourth Circuit filed March 19, 2009 ..... App. 1

B. Judgment of The United States Court of Appeals for The Fourth Circuit filed March 19, 2009 ..... App. 4

C. Memorandum Opinion of
The United States District
Court for the Eastern District of
Virginia
filed June 2, 2008 ..... App. 6

D. Order of
The United States District
Court for the Eastern District of
Virginia
Re: Granting Defendant's
Motion to Dismiss and Denying
Defendant's Motion for
Summary Judgment
filed June 2, 2008 .....App. 17

TABLE OF AUTHORITIES

Page(s)

CASES

Bivens v. Six Unknown Agents of the Bureau of Narcotics and Dangerous Drugs,
403 U.S. 388 (1973) 2, 9

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 11

Katz v. United States,
389 U.S. 347 (1967) 10

United States v. Breza,
308 F.3d 430 (4th Cir. 2002) 10

United States v. Jacobsen,
466 U.S. 109 (1984) 10

Wilson v. Layne,
526 U.S. 603 (1999) 11

CONSTITUTIONAL PROVISION

U.S. CONST. amend. IV ..... *passim*

STATUTES

18 U.S.C. § 1920 9

28 U.S.C. § 1254(1) 1

RULES

FED. R. CIV. P. 12(B)(6) 3

U.S. SUP. CT. R. 10(c) 1

PETITION FOR WRIT OF CERTIORARI

NOW COMES Sami Gaber, Petitioner herein, and requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision filed on March 19, 2009, affirming the decision of the District Court denying relief on his complaint.

OPINIONS BELOW

On March 19, 2009, the United States Court of Appeals for the Fourth Circuit issued an opinion finding no error in the decision of the District Court This opinion is unpublished and filed with this petition. The decision and Memorandum Opinion and Order of the District Court are also files with this petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10(c) of the Supreme Court Rules.

CONSTITUTIONAL AUTHORITY INVOLVED

The Fourth Amendment to the United States Constitution provides, that

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Asserting a violation of his rights guaranteed by the Fourth Amendment, Plaintiff Sami Gaber filed this action against the Postmaster General of the United States, the Station Manager of the Fairfax Station Post Office, and two Special Agents of the Office of the Inspector General of the United States Postal Service. Brought under the principle announced by the Supreme Court in *Bivens v. Six Unknown Agents of the Bureau of Narcotics and Dangerous Drugs*, 403 U.S. 388 (1973). Plaintiff's claims arise from an investigation of whether, while on leave from work as a consequence of a claimed workplace injury, he was surveilled because of a false accusation by Michael Kearney, the then Station Manager of the Fairfax Station Post Office of the United States Postal Service. Defendant Kerney caused an investigation to be initiated by Office of the Inspector General of the United States Postal Service by reporting that Plaintiff Gaber had filed a false injury claim. Thereafter Special Agent Kristin Henderson surveilled Plaintiff Gaber at his home and at the Pentagon in Washington, DC. and with Special Agent Michael Spolidoro filmed the Plaintiff. These activities were based upon an authorization which was issued by a member of the Executive Branch of the Government of the United States based upon the report of Defendant Kearney. At no time has there been any evidence that Plaintiff Gaber's injury was faked or falsely reported. In fact,

Plaintiff Gaber did not file his first request for compensation until most of Special Agent Kristin Henderson surveillance's activities had been completed.

Defendants moved to dismiss pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure. The Honorable James C. Cacheris granted the Defendants' Motion. Thereafter the Appellant appealed and his appeal was denied.

STATEMENT OF THE FACTS

1) At all relevant times, Appellant Sami Gaber was employed by the Postal Service as a rural letter carrier assigned to the Fairfax Station Post Office. (JA 512)[1]

2) On October 11, 2005, Appellant requested authorization in advance to take annual leave on certain upcoming workdays, but USPS supervisors denied his request. (JA 551) Shortly thereafter, Appellant was found lying on the ground outside the Fairfax Station Post Office, complaining that he had slipped and fallen on wet leaves. (JA 545) There were no witnesses to the fall. (JA 545) Appellant was taken by ambulance to the emergency room at Inova Fair Oaks Hospital, where he was evaluated. (JA 545) Dr. Meehan prescribed pain medication and instructed Appellant to apply ice to sore areas and follow-up with an orthopedist in two to three days. (JA 552) Dr. Meehan further instructed Appellant to

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[1] References to J.A. are to the Joint Appendix submitted to the Court of Appeals.

rest for several days and then return to work. (JA 552) He did not recommend that Appellant's work activities be restricted in any way. (JA 552)

3) After being evaluated by Dr. Meehan, Appellant was seen by Dr. Adel Kebaish, an orthopedist, and evaluated as completely disabled. (JA 552-557) On the basis of Dr. Kebaish's evaluation, USPS awarded Appellant Continuation of Pay. (JA 552) After Appellant's period of Continuation of Pay expired, Appellant was placed on the daily rolls. Appellant did not return to work until February 2006, when he began working four hours of limited duty each day. (JA 585)

4) In order to continue receiving workers' compensation benefits on the daily rolls, Appellant was required periodically to complete and return to the Department of Labor two forms: Form CA-7 and Form CA-17. On the Form CA-7 Claim for Compensation, Appellant was to provide certain personal information relevant to his claim for workers' compensation. On the Form CA-17 Duty Status Report, a physician was to evaluate Appellant's injuries and assess his capacity to perform different types of work-related physical activities.

5) While on the daily rolls, Appellant completed four Forms CA-7, dated December 17,2005 (JA 563); January 20, 2006 (JA 563); March 17, 2006 (JA 573); and April 28, 2006. (JA 573) On each of these forms, Appellant was asked, "Have you worked outside your federal job during the period(s) [for which workers' compensation was claimed]?

(Include salaried, self-employed, commissioned, volunteer, etc.)." On each of these forms, Appellant answered this question, "No."

6) On October 13, 2005, DeNeatria Rodgers, an injury compensation specialist at the USPS Injury Compensation Office in Merrifield, Virginia, contacted the USPS Office of the Inspector General ("OIG") to report that Mike Kearney had reported that Appellant was suspected of falsely claiming an injury in order to obtain workers' compensation. (JA 126-7) In response to the information received from Ms. Rodgers, OIG initiated a case on November 11, 2008, and began investigating the allegations. (JA 161)

7) OIG Special Agent ("SA") Kristin Henderson conducted surveillance of Appellant outside his residence on three occasions during November and December 2005. (JA 537-8) and (JA 170) The purpose of the surveillance was to verify whether the postal employee is abiding by documentation provided by doctors. (JA 168-9) This surveillance consisted of SA Henderson, sitting inside her car–which was parked on the street, some distance from Appellant's house–and observing activities outside of Appellant's residence. SA Henderson also captured video footage of activities occurring outside Appellant's residence from her public vantage point. (JA 171)

8) On two occasions, SA Henderson observed Appellant outside his home, driving a vehicle to another location. On one occasion, SA Henderson observed Appellant leaving his house and driving to

the Franconia-Springfield Metro Station. SA Henderson then continued to surveill Appellant on foot inside the Metro and observed Appellant exiting the Metro system at the Pentagon Metro Station. (JA 546) After Appellant left the station, SA Henderson observed Appellant meeting a woman outside the Pentagon and then being escorted into the Pentagon itself. (*Id.*) SA Henderson did not follow Appellant into the Pentagon. (*Id.*) On another occasion, SA Henderson and another Special Agent, Chris Wilson, observed Appellant arrive in a white van at the National Orthopedic Clinic and Spine Center. (*Id.*) SA Henderson watched Appellant park the van and eventually walk into the office building, but SA Henderson did not follow Appellant into the building. (*Id.*) SA Henderson waited in her car in the parking lot outside the building, and after approximately fifty minutes, saw Appellant leave the building. (*Id.*) From her car, SA Henderson observed Appellant get back into the van, where he remained for another twenty minutes. (*Id.*) He then got out of the van and engaged another, unfamiliar person in conversation in the parking lot outside the office building. (*Id.*) SA Henderson then ended the surveillance. (*Id.*)

9) In addition to these observations of Appellant's personal activities, on at least one occasion, SA Henderson also observed numerous Century 21 real estate signs laying against the outside of Appellant's home, visible from her public vantage point. (JA 546)

10) After observing these signs outside Appellant's residence, SA Henderson conducted state

wage and Internet searches, and discovered that, contrary to Appellant's statements on the Forms CA-7, Appellant was reported as actively selling real estate for Century 21 Real Estate Company in Burke, Virginia. (*Id.*)

11) Following SA Henderson's discovery, the USPS OIG obtained consensual monitoring approval for an undercover operation involving Appellant on December 20, 2005. (*Id.*) Three OIG Special Agents–SA Brandy Osteen, SA Michael Spolidoro, and SA Chris Wilson–all consented to be monitored electronically, and approval was granted by the USPS OIG Director and the USPS OIG Acting Deputy Inspector General for Investigations on December 14, 2005, and by the USPS OIG Acting Deputy General Counsel on December 16, 2005. (*Id.*)

12) For the undercover operation on December 20, 2005, SAs Brandy Osteen and Michael Spolidoro posed as a married couple with the names Michael and Brandy Walker. (JA 176) Posing as Dr. Michael Walker, SA Spolidoro called the Century 21 office shortly before December 20, 2005, and left a message informing Appellant that he and his wife were interested in being shown homes listed for sale by Appellant, as a Century 21 real estate agent, in the Gainesville, Virginia area. (JA 249 and 450 *et seq.*) Appellant returned the call and agreed to the showings. (*Id.*)

13) On December 20, 2005, Appellant met the couple as requested and showed the couple two homes in the Lake Manassas subdivision in the Gainesville, Virginia area over approximately a two-

hour period. (*Id.*) During that time, SA Osteen videorecorded the showings with a silent video camera carried in a camera bag and SA Spolidoro audiorecorded the showings with audio equipment concealed on his person. (*Id.*) The audio transmissions were received remotely by SA Henderson, who was not present in the homes being shown by Appellant. (*Id.*) SA Henderson also captured a small amount of video footage across the street from the houses Appellant showed SAs Spolidoro and Osteen. (*Id.*)

14) The agents met Appellant at the first home he was to show them, and used electronic surveillance and recording equipment only while Appellant was in their immediate presence. (*Id.*) The agents did not film Appellant using the restroom or in any other sensitive locations or situations. (*Id.*) The agents never rode in the same car as Appellant, and did not follow Appellant after the showing of the second house. (*Id.*)

15) While showing the homes, Appellant told the agents that he had sold six homes in that neighborhood, that he would complete the sale of another home in the neighborhood that week, and that he was available "24 hours" a day to show them homes or negotiate the sale of real estate. (*Id.*) These statements were recorded on the audio equipment on SA Spolidoro's person. (*Id.*)

16) Within days of this interview, Appellant was placed on emergency off-duty status without pay, pursuant to a collective bargaining agreement between the USPS and the National Rural Letter

Carriers' Association. (JA 510) On the basis of the evidence gathered by SA Henderson's surveillance and the undercover operation on December 20, 2005, Appellant was criminally prosecuted by the Office of the United States Attorney for the Eastern District of Virginia. Appellant was tried by United States District Judge T.S. Ellis, III, for false statements or fraud to obtain federal employees' compensation in violation of 18 U.S.C. § 1920. (JA 513) On October 4, 2006, after a two-day trial, Appellant was acquitted of both charges.

17) Prior to the Appellant's injury, Defendant Kearney had stated that he intended to fire the Appellant. (JA 639)

REASONS WHY THE WRIT SHOULD ISSUE

The *Fourth Amendment* guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. Surveillance is defined in the Merriam-Webster dictionary as close watch kept over someone or something (as by a detective). Search is defined in the Merriam-Webster dictionary as to look into or over carefully or thoroughly in an effort to find or discover. To conduct surveillance is to search. In either case citizens of the United States have the right under the *Fourth Amendment* to be secure in their persons from unreasonable intrusions by their right to be left alone.

In *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), the Supreme Court recognized for the

first time a cause of action for damages against an individual acting under color of federal law based exclusively on an alleged violation of the Constitution.

The right to privacy as recognized in *Katz v. U.S.*, 389 U.S. 347 (1967) is fundamental to our society. It is really the right to be let alone as discussed by Warren and Brandies in their 1890 Harvard Law Review article of the same title. The Resolution of the First Congress Submitting Twelve Amendments to the Constitution; March 4, 1789 stated in the Sixth Article that,

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This principle was retained in the Fourth Amendment to the U.S. Constitution. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Breza*, 308 F.3d 430, 433 (4th Cir. 2002) (*quoting United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Search is defined in the Merriam-Webster dictionary as to look into or over carefully or thoroughly in an effort to find or discover. To conduct surveillance is to search. In the present matter, the facts reveal that the Appellant was surveilled without a judicial warrant. The

information upon which the surveillance was "authorized" by a member of the United States Postal Service was untested and unreliable. It was submitted by Appellee Kearney to harass the Mr. Gaber and in hopes that it lead to Plaintiff's termination.

As stated by the attorney for the Government, qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Fourth Amendment is a constitutional right of which a reasonable person would have known. The test, moreover, is whether "reasonable officials" situated as was the defendant *could have thought* the conduct in issue permissible under the Constitution in light of the circumstances confronting them. *Wilson v. Layne*, 526 U.S. 603, 613-14 (1999). In this case, the misuse of the Appellee Kearney's position is impermissible. The use of government agents to surveill the Plaintiff prior to any indication of wrongdoing is improper and unreasonable.

To be secure in one's person is to have one's privacy protected from unwanted intrusion. That expectation of privacy may be reduced when there exists articulable reasons supportive of societal goals but never when one uses false information for personal ends. Appellee Kearney did intruded into Appellant 's legitimate privacy interests by causing an unwarranted surveillance. Appellees Henderson

and Spolidoro were the persons whose surveillance actually violated the Appellant's privacy and who initially acted without any well based suspicion that Mr. Gaber has acted improperly in any manner.

Again the Fourth Amendment guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. This right is based upon the right "to be secure in their persons." This right was intended to protect personal privacy and to enforce the ability to be let alone.

CONCLUSION

Mr. Gaber respectfully requests that this Court grant review to determine if the actions of the Respondents constitute an actionable violation of his rights guaranteed by the Fourth Amendment to the United States Constitution.

Respectfully submitted this the 17th day of June, 2009.

/s/

[FILED: MARCH 19, 2009

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1723

SAMI GABER,

Plaintiff - Appellant,

v.

KRISTIN HENDERSON, Special Agent, Office of the Inspector General; MICHAEL SPOLIDORO, Special Agent, Office of the Inspector General; MICHAEL KEARNEY, Station Manager, United States Postal Service,

Defendants – Appellees,

and

JOHN E. POTTER, United States Postmaster General,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (1:08-cv-00076-JCC-TCB)

Submitted: March 17, 2009 Decided: March 19, 2009

Before TRAXLER, KING, and AGEE, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Dean E. Wanderer, DEAN E. WANDERER & ASSOCIATES, Fairfax, Virginia, for Appellant. Chuck Rosenberg, United States Attorney, R. Joseph Sher, Catherine D. Wood, Assistant United States Attorneys, Alexandria, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Sami Gaber appeals the district court's order denying relief on his 42 U.S.C. § 1983 (2006) complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Gaber v. Henderson, No. 1:08-cv-00076-JCC-TCB (E.D. Va. filed June 2, 2008; entered June 3, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED: March 19, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1723
(1:08-cv-00076-JCC-TCB)

SAMI GABER,

Plaintiff - Appellant

v.

KRISTIN HENDERSON, Special Agent, Office of the Inspector General; MICHAEL SPOLIDORO, Special Agent, Office of the Inspector General; MICHAEL KEARNEY, Station Manager, United States Postal Service,

Defendants - Appellees

and

JOHN E. POTTER, United States Postmaster General,

Defendant

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[FILED JUNE 2, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SAMI GABER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:08cv76 (JCC)
	)	
SPECIAL AGENT KRISTIN HENDERSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Dismiss or for Summary Judgment. For the following reasons, the Court will grant Defendants' Motion to Dismiss and deny as moot Defendants' Motion for Summary Judgment.

I. Background[1]

Plaintiff Sami Gaber ("Plaintiff") was previously employed by the United States Postal Service ("USPS") as a rural letter carrier assigned to the Fairfax Station Post Office. On October 11, 2005, while an employee of the USPS, Plaintiff allegedly suffered a workplace injury that left him disabled. As a result of the injury, Plaintiff was first awarded Continuation of Pay and, once that expired, workers' compensation benefits on the daily rolls. According to his Complaint, on November 3, 2005, Dee Rodgers, an Injury Compensation Specialist with the USPS, submitted false information concerning Plaintiff in a claim fraud report. This information, allegedly provided at the behest of Defendant Michael Kearney ("Kearney"), the Station Manager for the Fairfax Station Post Office, implied that Plaintiff had filed and was filing false claims.

As a consequence of the report, during the months of November and December 2005 Defendant Special Agent Kristin Henderson ("SA Henderson") conducted surveillance of Plaintiff and his residence. In addition, SA Henderson and Defendant Special Agent Michael Spolidoro ("SA Spolidoro") conducted an undercover operation that utilized hidden video

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[1] Though the Court will dismiss Plaintiff's Complaint for failure to state a claim and will not consider facts beyond those stated in the Complaint, the Court notes that Plaintiff does not dispute any of the facts put forth by Defendants as part of their Motion for Summary Judgment, and provides only a single disputed fact in its opposition.

and audio equipment to determine whether Plaintiff had engaged in illegal activity.[2]

On January 25, 2008, Plaintiff filed a Complaint against Kearney, SA Henderson, SA Spolidoro, and John E. Potter, the U.S. Postmaster General[3] (collectively, "Defendants"), seeking damages for the violation of his Fourth Amendment rights. On March 31, 2008, Defendants filed the instant Motion to Dismiss or for Summary Judgment. This matter is currently before the Court.

II. Standard of Review

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint, *see Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994), and should be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *De Sole v. United States*, 947 F.2d 1169, 1177 (4th Cir. 1991)(citations omitted); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

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[2] This investigative activity led to the prosecution of Plaintiff for false statements or fraud to obtain federal employees' compensation in violation of 18 U.S.C. § 1920. On October 4, 2006, after a two-day bench trial, Plaintiff was acquitted of all charges by United States District Judge T.S. Ellis, III.

[3] On May 15, 2008, Plaintiff voluntarily dismissed his claims against John E. Potter.

In passing on a motion to dismiss, "the material allegations of the complaint are taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Moreover, "the complaint is to be liberally construed in favor of plaintiff." *Id.* In addition, a motion to dismiss must be assessed in light of Rule 8's liberal pleading standards, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. However, while Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1964-65 (2007)(citation omitted).

III. Analysis

Plaintiff brings his action for damages under the principle announced by the Supreme Court in *Bivens v. Six Unknown Agents of the Bureau of Narcotics and Dangerous Drugs*, 403 U.S. 388 (1971). In their Motion to Dismiss or for Summary Judgment, Defendants argue that they are shielded by the doctrine of qualified immunity.[4] The Court will first address the interplay between *Bivens* actions and qualified immunity before turning to Defendants' arguments for dismissal. Because the Court finds that Plaintiff has failed to state a claim

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[4] Defendants also contend that Plaintiff's failure to serve each Defendant individually stripped the Court of personal jurisdiction. However, because Defendants have since waived individual service of process, the Court need not address this issue and will turn to the merits of Plaintiff's claims.

against either Kearney, SA Henderson, or SA Spolidoro, the Court need not address Defendants' Motion for Summary Judgment.

A. *Bivens* Actions and Qualified Immunity

In *Bivens*, the Supreme Court recognized a cause of action for damages against an individual acting under the color of federal law based on an alleged Constitutional violation. 403 U.S. at 390-97. *Bivens* actions are brought against federal employees in their individual capacity, and thus seek damages from the personal resources of those employees named as defendants. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Recognizing the social costs of holding federal officers individually liable, the Supreme Court developed the doctrine of qualified immunity, which shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For a right to be "clearly established," its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Saucier v. Katz*, 533 U.S. 194, 202 (2001)("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.").

Because qualified immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), the issue of whether qualified immunity applies should be made "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). The Supreme Court has established a framework for resolving assertions of qualified immunity. *See Saucier* 533 U.S. at 201. First, a court must consider whether the facts alleged show that the officer's conduct violated a constitutional right. *Id.* If the allegations construed in the light most favorable to the injured party make out a violation, "the next, sequential step is to ask whether the right was clearly established." *Id.* However, if no constitutional right would have been violated were the allegations established, "there is no necessity for further inquires concerning qualified immunity."[5] *Id.* The Court will now apply the *Saucier* framework to Plaintiff's claims.

B. Claim Against Defendant Kearney

In his Complaint, Plaintiff alleges that "[o]n November 3, 2005, at the intentional malicious, wrongful and knowingly false request of Defendant Michael Kearney, Dee Rodgers, Injury

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[5] Some courts that have resolved cases on the first *Saucier* question have found that the absence of a constitutional violation entitles a defendant to qualified immunity. *Henry v. Purnell*, 501 F.3d 374, 378 n.3 (4th Cir. 2007). In several recent opinions, however, the Supreme Court appears to have segregated the question of whether a constitutional violation occurred from the question of whether a defendant is entitled to qualified immunity. *See id.* (citing cases).

Compensation Specialist, submitted information recorded on [a] Claim Fraud Report concerning the Plaintiff [that] was false." Pl.'s Compl. ¶ 7. The allegedly false portions of the claim fraud report were a notation stating that Plaintiff exceeded his physical limitation and a comment noting that he "has had several other claim[s] where he has missed time from work." *Id.*

Even accepting the truth of these allegations, Plaintiff has not pled a violation of a clearly established right. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The protections of the Fourth Amendment are only implicated if there is a "search" or a "seizure." *United States v. McCoy*, 513 F.3d 405, 411 (4th Cir. 2008). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Breza*, 308 F.3d 430, 433 (4th Cir. 2002)(quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). A "seizure" occurs "when there is a governmental termination of freedom *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

Here, Plaintiff cites no authority, and the Court can unearth none, that suggests that Kearney's alleged actions constituted a "search" or a "seizure." It is unquestionably the case that the Fourth Amendment is violated when "a police officer deliberately, or with reckless disregard for the truth, . . . make[s] material misrepresentations or

omissions to seek a warrant that would otherwise be without probable cause." *Miller v. Prince George's County, MD*, 475 F.3d 621, 632 (4th Cir. 2007); *see also Smith v. Reddy*, 101 F.3d 351, 355 (4th Cir. 1996). This case, however, does not involve statements made by a law enforcement officer to a magistrate judge in an effort to secure a warrant. The Court cannot see how statements – even knowingly false ones – made to a body authorized to initiate an investigation is an action that infringes a reasonable expectation of privacy. Nor can the Court see how Kearney's actions restricted Plaintiff's freedom of movement. Consequently, the Court finds that Plaintiff has failed to allege a constitutional violation and therefore is unable to survive the first step of the *Saucier* framework.

Even were the Court to find that a Fourth Amendment violation occurred, there is no authority to support a finding that the right is clearly established in that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. As the Fourth Circuit has held, qualified immunity "protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines.'" *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998), *aff'd*, 526 U.S. 603 (1999)(quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)). The sheer absence of any authority supporting the alleged constitutional right indicates that Plaintiff's allegations detail, at best, gray areas. Thus, the Court will dismiss the claim against Defendant Michael Kearney.

C. Claims Against Defendants SA Henderson and SA Spolidoro

Plaintiff alleges that SA Henderson surveilled Plaintiff and Plaintiff's residence on several occasions, without lawful authorization or a valid warrant, in violation of the Fourth Amendment. Pl.'s Compl. ¶ 8. It is well-established that "what a person knowingly exposes to the public, even in his own home . . ., is not a subject of Fourth Amendment protection." *United States v. Taylor*, 90 F.3d 903, 908 (4th Cir. 1996) (internal citations and quotation marks omitted). Thus, when a federal agent makes "observations from a public vantage point where has a right to be and from which the activities or objects he observes are clearly visible, [his observations] do not constitute a search within the meaning of the Fourth Amendment." *Id.* (internal citations and quotation marks omitted). While Plaintiff makes the conclusory allegation that SA Henderson's surveillance violated his Fourth Amendment rights, he pleads no facts to support that contention. The allegation that SA Henderson surveilled Plaintiff and his residence does not, by itself, indicate that there was even a search that would implicate Fourth Amendment protections, much less a violation of a clearly established right. Without more, even applying Rule 8's liberal pleading standards, Plaintiff's claim cannot survive.

Moreover, the fact that the surveillance was conducted without a warrant does not save Plaintiff's claim. The warrant requirement is only implicated where there is a "search" or "seizure" within the meaning of the Fourth Amendment. *See,*

e.g., *Wyman v. James*, 400 U.S. 309, 316-18 (1971)(noting that while a warrantless search of private property is typically unreasonable, that "natural and quite proper protective attitude" is not a factor where there is no "search . . . in the Fourth Amendment meaning of that term"). Thus, because Plaintiff does not sufficiently plead that a "search" in fact occurred, the absence of a warrant is irrelevant. The Court therefore finds that Plaintiff has failed to state a Fourth Amendment claim against SA Henderson for surveilling Plaintiff and his residence.

The Complaint also states that SA Henderson and SA Spolidoro conducted an undercover operation involving video and surveillance of the Plaintiff in situations where he had a reasonable expectation of privacy, without lawful authorization or a valid warrant, in violation of Plaintiff's Fourth Amendment rights. Pl.'s Compl. ¶ 9. The law clearly provides that electronic recording by an undercover agent, even in a place where an individual ordinarily has a reasonable expectation of privacy, is not a search within the meaning of the Fourth Amendment. *See, e.g.*, *United States v. Hoffa*, 385 U.S. 293, 301-03 (1966)(finding that an individual has no reasonable expectation of privacy in statements made or conduct performed in the presence of an undercover agent or confidential informant, even in a place where one ordinarily has a reasonable expectation of privacy); *United States v. White*, 401 U.S. 745, 751 (1971)(holding that the Fourth Amendment is not violated when an undercover agent electronically records conversations with an individual when invited into a place in which that individual ordinarily has a

reasonable expectation of privacy); *United States v. Davis*, 326 F.3d 361, 366 (2d Cir. 2003)(finding that videorecording by an undercover agent is likewise permissible under the Fourth Amendment); *United States v. Brathwaite*, 458 F.3d 376, 380-81 (5th Cir. 2006)(same). Given this substantial precedent, Plaintiff's conclusory assertion that he was filmed during undercover operations in a situation in which an individual otherwise has a reasonable expectation of privacy is insufficient to support a Fourth Amendment claim. Furthermore, as the Court explained above, the fact that this video surveillance occurred without a valid warrant is irrelevant because Plaintiff has failed to sufficiently plead that a search even took place. Thus, the Court will dismiss the claims against Defendants SA Henderson and SA Spolidoro.

IV. Conclusion

For these reasons, the Court will grant Defendants' Motion to Dismiss and deny as moot Defendants' Motion for Summary Judgment.

An appropriate Order will issue.

June 2, 2008
Alexandria, Virginia

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT
JUDGE

[FILED JUNE 2, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SAMI GABER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:08cv76 (JCC)
	)	
SPECIAL AGENT KRISTIN HENDERSON, et al.,	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Defendants' Motion to Dismiss is GRANTED;

(2) Defendants' Motion for Summary Judgment is DENIED AS MOOT; and

(3) the Clerk of the Court shall forward copies of this Order and accompanying Memorandum Opinion to all counsel of record.

THIS ORDER IS FINAL.

June 2, 2008
Alexandria, Virginia

_____/s/_____
James C. Cacheris
UNITED STATES DISTRICT
COURT JUDGE